

Heroes and theories

A response to Raphael Schäfer

Völkerrechtsblog

2019-04-17T15:04:11

In his [post](#), Raphael Schäfer provides a considerate, careful and kind re-reading of my dissertation on Hermann Mosler and West German international legal scholarship after 1945. Raphael makes, by and large, three critical remarks. First, he indicates that my exploration of alternative conceptions to the practice-oriented method might be a misfit. Second, he wonders whether I overemphasize Mosler's formative influence on German international legal scholarship. And third, he suggests that I should have engaged more thoroughly with Mosler's underlying theory of international law. Before I respond to these thoughtful and very welcome comments, I take issue with the hero story Raphael seems to recognize in my work.

On heroization

Raphael writes rather casually that I chose “an imminent international legal scholar as the hero of [my] book”. In another passage, he refers to Mosler as “Lange's hero”. Thereby he puts my work in a scholarly tradition of biographical writing which highlights the lawyer's contribution to the field and presents him (only very rarely her) as a role model for future generations.

Of course, after publication the author loses ownership over the interpretation of his or her work. User manuals on how to read one's scholarly work do not lead very far. Nonetheless, I suggest that my book does not have to be understood as a “Heldenepos”. I have to grant Raphael that, by calling Mosler a “Wegbereiter” I might invite the hero connotation. However, as I indicate, I define the term “Wegbereiter” as a precursor of some method or concept, be it good or bad, rather than as a pioneer of something one should subscribe to. Furthermore, I explain in my introduction, that I chose Mosler to explore the origins of the practice-oriented method and conception of global constitutionalism because of his formative influence on the discipline (see next point) and because I could rely on rich archival material. I detect various factors and motivations which explain his methodological and conceptual inclinations without embracing them as convincing or exposing their flaws. Instead, because I understand my research as empirical and analytical, I opted for trying – as much as possible – to leave it to the reader to make his or her own judgment.

Even though my work is clearly no deconstructive exercise, some of my findings might call for criticism of Mosler's approaches. For instance, is the argument convincing that theoretical approaches had been discredited by National Socialist *Großraum* theory given that the anti-Semitic *Blutschutzgesetze* received formalist legal commentary and that the Berlin Kaiser Wilhelm Institute for Comparative Public Law and International Law had legally justified anti-Versailles policies throughout the

1930s? Might the Catholic natural law background of Mosler's 1974 Hague lecture with its reliance on "constitutional elements" in international law be an argument against global constitutionalism's potential as a universal theory? I submit that in this sense my work invites for critical reflection.

On "the" German approach

For Raphael, my chapter on alternative approaches to international law in West German scholarship seems somewhat foreign. The motivations behind the alternatives are not explained and not connected rigorously enough with Mosler's perspective.

By including Wilhelm Grewe's historic-political, Wilhelm Wengler's theoretic-sociological and Ulrich Scheuner's philosophic-historical perspective, I tried to avoid creating the impression that "the German approach" exclusively consists of practice-orientation. Since historical studies have a tendency to focus on the dominating approach, it is highly important also to engage with alternative scholarly avenues, even if they do not end up becoming mainstream. Furthermore, I indicate that these alternative approaches stem from lines of thought in German legal scholarship predominant in the 1920s and 1930s. Raphael is right that more explanation could have been done. But since this would have somewhat shifted the focus away from Mosler as my narrative center, I think it is fair to leave this to someone else.

On formative influence

Raphael questions whether I provided enough evidence that Mosler "shaped German international legal scholarship." The evidentiary bar for such a claim remains in the eye of the beholder. Yet in Mosler's case I think I can be quite confident. As I demonstrate, Mosler supervised 10 *Habilitanden* (long-term postdoc researchers), many more than any other German international lawyer. All of these lawyers received chairs for public, European and/or international law at West German universities and subscribed to the practice-oriented method often referring to Mosler and the Heidelberg Max Planck Institute as their intellectual cradle. This led outside observers to even speak of the "scuola di Heidelberg". Moreover, I emphasize that Christian Tomuschat and Jochen Frowein in their post-cold war works on the constitutionalization of international law, referenced Mosler's 1974 Hague lecture ideas about "constitutional elements". In this sense, Mosler's legacy is still visible in contemporary debates about practice-orientation and interdisciplinarity as well as pragmatism and constitutionalization in (German) international legal scholarship.

On theories of international law

Raphael argues that "unfortunately, the book has only little to say on Mosler's position vis-à-vis the theory of international law" and wonders about Mosler's "underlying understanding" of the law. In my view, however, in some sense the whole book is about Mosler's "theory" in the context of German international legal scholarship. I submit that what I call method and conception can also be understood as "theory" if one defines a theory as "ideas that are suggested to explain a fact or

event” (Cambridge Dictionary). With his practice-oriented method, Mosler intended to explain the normative content of the international legal system. With his conception of “international society as an international legal community” he put forward his understanding of the role of international law in international relations. Moreover, Mosler based parts of his Hague lecture on natural law theories, borrowing from Francisco de Vitoria, Francisco Suárez and Alfred Verdross. Even though – as Raphael rightly senses – Mosler would probably never have called his own work a theory, it is hard to see how Mosler’s work could be grounded in an even deeper layer of “theory” which brings all the pieces together.

Felix Lange, [Praxisorientierung und Gemeinschaftskonzeption. Hermann Mosler als Wegbereiter der westdeutschen Völkerrechtswissenschaft nach 1945](#), Springer, Heidelberg 2017, 405 p., 94,99 €, ISBN 978-3-662-54218-7

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Cite as: Felix Lange, “Heroes and theories. A response to Raphael Schäfer”, *Völkerrechtsblog*, 17 April 2019.

